all proceedings or make an order similar to that made in Suit No. 724 of 1930, already referred to, giving the plaintiffs the opportunity of obtaining the leave of the Attorney-General. The latter course would seem to me the better in the interests of all parties as it will save the expense of instituting proceedings anew, and I make an order accordingly that the plaintiffs do within six weeks substitute the Attorney-General as plaintiff, in default thereof all proceedings to be set aside with costs to be taxed and paid by the plaintiffs to the defendants. Costs of and incidental to the amendment to be the defendants in any event. All other questions of costs reserved.

Order accordingly.

Solicitors for the Plaintiffs—
Adams & Allan.

Solicitors for the Defendants 1—15—
Hogan & Ivens.

[APPELLATE CIVIL JURISDICTION]

FISHER, J., EBDEN & SPROULE, JJ.

August 7, 1912.

V. V. R. SOMASUNDARAM CHITTY
v.
A. R. P. AROONASALAM CHITTY

[SINGAPORE CIVIL APPEAL No. 3 of 1912]

Practice—Mortgage Debt, Action for—Mortgagee in possession—Special Indorsement on Writ—Summary Judgment—Civil Procedure Code 1907, S. 208.

Per C. A. (Fisher and Sproule JJ. Ebden J. diss: reversing Hyndman-Jones, C.J.):—

Unconditional leave to defend an action should be given to a Mortgagor where the Mortgagee having been in possession is seeking to recover the balance of his mortgage money, without an account thereof having been taken by the Court; and such account is claimed.

Appeal from the order of Hyndman-Jones, C.J. at Chambers, affirming the order of the Registrar giving leave to the Plaintiff to sign summary judgment unless the sum of $5,000 were paid into Court by the Defendant.

The material facts of the case are stated in the judgment of Sproule, J.

Koek (Sr.) (*Parsons* with him) for the Defendant.

A. K. a B. Terrell for the Plaintiff.

The matter was argued on the 1st and 2nd July, 1912, when the Court of Appeal (Fisher, Ebden and Sproule, JJ.) reserved judgment, which was delivered on the 7th August, 1912.

Cur. Ad. Vult.

FISHER, J.—In this case I have somewhat regretfully come to the conclusion that the appeal must succeed for I find it impossible to hold that there is not a plausible dispute as to what the plaintiff is entitled to recover, or that there is not a triable issue to go before the Court, or that it would be possible to say, without going into the merits, that it is impossible that there should be a defence.

The cases cited seem to leave no doubt that for the purposes of Order XIV it is not permissible to go into the merits, except possibly as far as in certain cases to enable the Court to say positively that no defence is possible and also to make it clear that if there is a triable issue and a plausible dispute, and no impossibility of a defence the defendant is entitled to unconditional leave to defend. The regret I feel arises from the impression I cannot but gather from the learned Chief Justice's words that the proposed defence and counterclaim savoured of unsubstantiality and lack of ground, and that he therefore did not think it right to interfere with the Registrar's discretion in putting defendant on conditions. I think, however, that in the cases, that is not enough, and defendant must have leave to defend unconditionally.

The Appeal therefore succeeds, and the order will be that defendant should have unconditional leave to defend, and his costs of the appeal and of the hearing below.

EBDEN, J.—I differ from what I understand to be the view of the rest of the Court in that I do not think that the Judgment under Appeal should be disturbed. Counsel for Appellant who has put his case before us very clearly has pointed out, that the principle on which the Court acts, is that where Defendant can shew by affidavit that there is a *bona fide* triable issue he should be allowed to defend that issue unconditionally and that when once a reasonable ground of defence is shewn there is no power to go into the merits in considering leave to defend. Also that leave should be given when there is reasonable ground for enquiry on an account in order to ascertain the amount recoverable. But the defendant's affidavits must condescend upon particulars which must be sufficient to show a *bona fide* defence.

The Defendant in his affidavit complained the Plaintiff had rendered him no accounts of rents and income of the property from 5.1.10 onward. But Plaintiff went into possession only in April, 1911, the property having been till then in the hands of Messrs. Powell & Co. the receivers appointed by the Court. If Defendant had anything to say about the accounts up to that date he should have called on the Receivers to vouch. When Plaintiff went into possession he continued the services of Messrs. Powell & Co. as his agents to receive the rents and profits so that the accounts were kept by the same hand throughout on 25.11.11 Plaintiff filed two sets of accounts one for the period of the Receivership for which he was not answerable and one for the seven months, April to October, 1911, inclusive the period during which he had been in possession.

Time was given to 8.12.11 for Defendant to go into the account and on that day the Registrar made his order. If Defendant had any fault to find with the account he could have filed a further affidavit but he did not do so.

Moreover a counterclaim is not a defence though it may be of the nature of one and if Defendant was in earnest he might quite well have brought an action for accounts and have asked that the two suits should be consolidated.

It seems to me therefore as it did to the learned Chief Justice that the Registrar had probably or I might say presumably and with reason, come to the conclusion that the proposed counterclaim was unsubstantial and groundless or in other words that there was good ground for believing that the defence was a sham defence and that he was "prepared very nearly to give judgment for the Plaintiff" (Annual Practice 1912, Vol. 1, p. 171, case cited under heading "subject to such terms.")

The Defendant's complaint of excessive interest charged rests on exhibit A a somewhat inept document which however does provide that if the principal sum or the interest on the mortgage is to be recovered through the Court the rate of interest mentioned in the mortgage Deed shall be charged and recovered. This means that before Defendant can raise a defence on this document he must show that Plaintiff had no occasion to come to Court to recover.

I understand that the other members of the Court are in accord in allowing the appeal so their Judgment prevails and I have nothing to say against costs following the result of the case.

SPROULE, J.—To secure advances up to $150,000 (of which amount $146,000 was actually advanced) the defendant mortgaged to the Plaintiff certain properties and submortgaged others, the latter being under mortgage to the defendant by one Tan Hood Keng.

These Tan Hood Keng properties from September, 1909 to March, 1911, were in the hands of Messrs. Powell & Co. as Receiver of the rents and profits during the pendency of another suit. They do not appear to have passed accounts before the Registrar or paid balance into Court. In April they paid to the plaintiff $2,721.06 being the balance of receipts over disbursements during the whole term of their Receivership. In March, 1911, the plaintiff entered into possession as mortgagee of the same properties Messrs. Powell & Co. continuing in charge as his agents. Their accounts as agents up to 31st October, 1911, show a loss of $82.44. No sums were spent in repairs by them between September, 1909, and 31st October, 1911. It does not appear whether the plaintiff entered into possession of the mortgaged properties other than Tan Hood Keng.

In October, 1911, the plaintiff issued the Writ in the present case, with a special endorsement claiming interest on $146,000 up to 13th October, 1911, at 10 per centum less four items of credit all stated to have been received to account of interest. The first of these four items was the $2,721.06 received from Powell & Co. The other three are admitted by the Plaintiff to have been rents collected personally by him independently of his agents.

The defendant duly entered appearance to this Writ. On 28th October, 1911 the plaintiff applied under our sections corresponding to Order XIV for final Judgment notwithstanding appearance. On 4th November, the defendant filed an affidavit denying the debt and foreshadowing two defences (a) a subsequent agreement varying the rate of interest convenanted for in the mortgage (b) a counterclaim for account. In an answering affidavit on 25th November, the plaintiff exhibited the agreement (marked A) and Messrs. Powell & Co's accounts.

On 1st December the application under Ord. XIV came before the Registrar and was adjourned to allow defendant's Solicitor to consider the accounts exhibited which, admittedly had not been delivered to the defendant before 25th October, 1911. On December, 8th the Registrar gave leave to defend conditionally upon $5,000– being paid into Court within 14 days.

The defendant appealed without success against the Registrar's order and now carries the matter before us.

Now I question if the learned Chief Justice in the Court below had the benefit of the many authorities cited before us. These authorities make it very clear that the summary provisions of Ord. XIV are not to be invoked to deprive a defendant of his right of defence where, without going into merits, it is made to appear, *prima facie* that there is a fair *bona fide* issue to be tried. Lord Esher, M.R. in *Lynde* v. *Warthman*, [(1805) 2 Q.B. 182], says: "If there is plausible dispute as to the amount the plaintiff is entitled to recover, I think the Judge was bound not to let Judgment be signed in the face of such a dispute and the Court of Appeal proceeded to give unconditional leave to defend. Again in *Jacobs* v. *Booth's Distillery Co.*, (85 L.T.R. 262), the House of Lords expressed even stronger views. Lord Halsbury, L.C. says "Ord. XIV was intended to prevent *sham defences* from defeating the rights of parties by delay" and Lord James of Hereford begins his judgment thus: My Lords, I only wish to make it very clear that in giving judgment in accordance with that of the Lord Chancellor i.e. reversing the Judgment entered under Ord. XIV "There is no expression

upon the merits of the case. The view which I think ought to be taken of Ord. XIV is that the tribunal to which application is made should simply determine "Is there a triable issue to go before a jury or a Court? It is not for that tribunal to enter upon the merits of the case at all. It ought to make the order only when it can say to the person who opposes the order. You have no defence. You could not by general demurrer (if it were a point of law) raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact."

Before I proceed to apply these principles to the case before us, I wish to distinguish the case of *Sheppard* v. *Wilkinson*, (6 Times L.R. 12), cited in the learned Chief Justice's Judgment. In that case it was admitted that there was no defence whatsoever to the claim, but the defendants desired to set up a counterclaim arising out of a deed in an independent and distinct cause of action. It was entirely in accordance with the above interpretation of Ord. XIV that Judgment should be entered for the claim, but execution stayed so as not to hamper this independent counterclaim. That is a very different case from the present, where the counterclaim arises out of the claim and is really in the nature of a defence pure and simple.

Can it be said, there, that in the present case without going into the merits, either defence sought to be set up by the defendant is a "sham defence" or not a triable issue or not a defence at all, or not a "plausible dispute"?

The head note to *Jacobs* v. *Booths' Distillery Co., (ubi supra)*, supplies a simple working rule to be applied. It provides that Judgment should not be entered under Order XIV except where assuming all the facts in favour of the defendant, they do not amount to a defence in law.

Apply that to the defence based upon agreement A. The learned Chief Justice looks upon it on an admission of the lowest rate, any way, mentioned in "A" which would entitle the plaintiff to enter Judgment for $14,000 or $15,000. On the other hand it is at least arguable that the claim should have been based, not on the mortgage, but upon this subsequent agreement, that consequently, the special endorsement is bad and that admittedly the error (if any) can only be cured in the course of pleadings in a reply to Defence and Counterclaim, a course from which the Plaintiff seeks to debar the defendant or at least in which he seeks to hamper him with conditions. I must not be taken to express any view on the merits but it seems to me that there is, at any rate, "a plausible dispute" and a triable issue of law.

As for the second line of defence, the defendant's position *prima facie* might seem to be an even stronger one. As mortgagee in possession, the plaintiff is liable to render strict accounts. He files Messrs. Powell & Co's accounts and it is held against the defendant that in 4 weeks at the outside, he is unable effectually to challenge these accounts. With great deference. I think the defendant should not have been called upon to do so. Just in passing, *Wallingford* v. *Mutual Society*,(5 A.C. 685), supplies a case where real laches of a much more serious description were not allowed to hamper the mortgagor's right to attack similar accounts and where he was freed by the House of Lords from conditions, imposed under Order XIV which might so hamper him. But let us look for a moment at the accounts as filed. The properties in Messrs. Powell & Co's hands were obviously of great value. Yet between September, 1909, and March, 1911, they produce $2,721.06 and in the following six months are worked at a loss without a cent being expended on repairs or capital expenditure. Moreover the plaintiff admits intruding behind his agents' backs and making collections on his own account. "Assuming all the facts in favour of the defendant" to quote the head note in *Jacobs'* case (*ubi supra*) can it be said here that "they do not amount to a defence in law"?

Once more I have no desire to enter upon the merits and there may or may not be entirely satisfactory replies to this defence. It remains however, that upon the authorities Judgment should certainly not be entered against the defendant in this case under Order XIV and if so, there is no ground whatsoever for imposing any conditions where, for all that may be gathered from the affidavits and exhibits, the claim may be wrongly conceived or brought upon a wrong basis, and where an account may, for all we know, be granted on a footing of wilful default, and, moreover, may (or may not) result in surcharges, or falsifications, or both, being brought forward and upheld which may (or may not) overtop the plaintiff's claim.

I wish to point out that the plaintiff, moreover, already holds securities under the mortgage and sub-mortgage.

For these reasons I think the appeal must succeed, with costs here and in the Court below.

Appeal allowed with Costs.

Solicitors for Plaintiff—*Drew & Napier.*

Solicitor for Defendant—*T. D. Parsons.*